Supreme Court, U.S.
FILED
00 644 OCT 19 2000
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No. _____

In The

Supreme Court of the United States

SUSAN L. GERHART,

Petitioner,

v.

EDWARD J. HAYES, GLENN GOERKE, JAMES T. HALE and WILLIAM A. STAPLES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Must à citizen establish the merits of a First Amendment claim in order to overcome the affirmative defense of qualified immunity?

In reviewing an interlocutory appeal of denial of qualified immunity does the appeals court apply summary judgment standards different from those generally applied?

PARTIES TO THE PROCEEDING

Petitioner is an individual citizen of the United States who at times material to the action was employed as director of a federally funded research program at the University of Houston – Clear Lake in Texas.

Respondents are Edward J. Hayes, Glenn Goerke, James T. Hale and William A. Staples, who at times material to the action were administrative officials of the University.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit opinion on petition for rehearing en banc (App. A) is reported at *Gerhart v. Hayes*, 217 F.3d 320 (5th Cir. 2000). The Fifth Circuit opinion (App. C) is reported at *Gerhart v. Hayes*, 201 F.3d 646 (5th Cir. 2000). The district court opinion (App. D) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on February 4, 2000. On June 2, 2000, the Court of Appeals entered an order denying a timely petition for rehearing en banc, and on June 29, 2000, the Court of Appeals entered an opinion and order on the petition for rehearing en banc deleting and substituting part of the original opinion. The Court of Appeals entered an order denying a petition for rehearing on July 26, 2000.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment and made actionable by 42 U.S.C. § 1983.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner directed a federally funded research program established by a cooperative agreement between the National Aeronautics and Space Administration (NASA) and the University of Houston – Clear Lake (UHCL). The program was named Research Institute for Computing and Information Systems (RICIS).

In July, 1994, the agreement was due for renewal. Petitioner supported the demand of the NASA contract officials for greater accountability for more than $100,000 of funds budgeted for finance and administration, which had been retained, but unspent, by UHCL. Petitioner agreed and argued to UHCL officials that the funds properly should be used for the research purposes of the project and not accumulated by the university to spend at its discretion. University colleagues supported petitioner's argument that the substantial amount of funds was being misapplied. Petitioner presented her arguments properly through prescribed channels to UHCL administrators and legal counsel. The respondent administrators vigorously disagreed with petitioner, and they had authority over petitioner's employment.

Petitioner was given notice that her employment as RICIS director would be terminated. She filed an internal appeal, and a grievance committee, charged only with reviewing the procedure, not the merits of the termination, found the termination procedurally correct, but recommended retaining the petitioner's employment. The recommendation was rejected and petitioner was terminated.

A. Petitioner's Exercise of Her First Amendment Rights to Free Expression.

Respondents admitted in their answer to petitioner's first amended complaint that they understood that the issue raised by petitioner was one of illegality and that petitioner had requested and obtained a meeting with the university's legal counsel on the issue.

Although the appeals court advisedly avoided what it characterized as a difficult issue of whether petitioner's speech on RICIS funding was on a matter of public concern, the district court so found, and such finding is consistent with well-established authority. See, for example *Barnes v. McDowell*, 848 F.2d 725, 734 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) ("[I]t is possible to view allegations that public monies are being spent unwisely and that a government program is being run inefficiently, as implying that a public agency or official is corrupt.")

B. Proceedings Below.

The trial court agreed with petitioner that the law with respect to the First Amendment claim was clearly established at the time petitioner was terminated, and that consequently summary judgment was not appropriate on qualified immunity, App. D, p. 24a *infra*.

From the outset, respondents argued in their interlocutory appeal that proof of intent is necessary to resist the qualified immunity defense, citing to *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). Respondents, also citing to *Crawford-El*, 523 U.S. at 599, argued that to resist qualified immunity petitioner must have affirmative evidence

from which a jury could find that petitioner carried her burden of proving motive.

Initially, the Fifth Circuit rested its judgment reversing the trial court's denial of summary judgment on its conclusion that petitioner had not established she was speaking as a citizen on a matter of public concern, rather than only in her role as an employee, App. C, pp. 17a-18a. Relying on its decision in *Wallace v. Texas Tech University*, 80 F.3d 1042, 1051 (5th Cir. 1996), the appeals court held that a public employee's speech is on a matter of public concern only when it involves a report of corruption or wrongdoing to higher authorities. *Id.* at p. 17a.

A timely petition for rehearing en banc was filed challenging the validity of *Wallace* and demonstrating that its rigid application would engender absurd results.

The petition for rehearing was denied, and instead, the Fifth Circuit panel withdrew the part of the opinion based on *Wallace* and the asserted failure of petitioner to prove she was speaking on a matter of public concern. Instead, the Fifth Circuit wholly ignored the limited qualified immunity issue and proceeded to determine the appeal on the merits. See App. A at p. 2a *infra*: "[I]t was dispositive of plaintiff's First Amendment retaliation claims that she could not establish that her speech was a 'substantial factor' motivating defendants' termination decision and that the defendants had shown that they would have taken the same action even in the absence of her speech."

In the substituted portion of its opinion, the Fifth Circuit panel made no mention at all of qualified immunity. The appeals court adopted the respondents'

argument and precise citation to *Crawford-El*, holding that the petitioner was required to present affirmative evidence from which the jury could find retaliatory motivation, *Id.* at p. 4a. The Fifth Circuit reversed the district court's denial of qualified immunity and rendered judgment for respondents holding that petitioner had not presented evidence of improper intent and that respondents established they would have fired petitioner regardless of her stated positions on RICIS funding. *Id.* at p. 5a.

Petitioner's petition for rehearing, asserting that the appeals court had exceeded the limited scope of review on qualified immunity, was denied.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE FIFTH CIRCUIT.

The holding of the Fifth Circuit that proof of improper motive is required to resist the affirmative defense of qualified immunity is plainly inconsistent with this court's opinion in *Crawford-El*, 523 U.S. at 588 ("[E]vidence of improper motive is irrelevant on the issue of qualified immunity.")

The appeals court decision undeniably is one based on evidentiary sufficiency. This court and the Fifth Circuit have held definitively that the limited jurisdiction of an appeals court on an interlocutory appeal of the denial of

qualified immunity does not extend to such determinations. See, for example, *Colston v. Barnhart*, 146 F.3d 282, 284 (5th Cir. 1998), *cert. denied*, 525 U.S. 1054 (1998), quoting *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996): "[D]eterminations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' under *Cohen* and *Mitchell*."[1] See, also, *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 633 (5th Cir.1999) ("We have appellate jurisdiction to review the district court's decision denying summary judgment only to the extent it turns on an issue of law. Or said differently, our appellate jurisdiction does not allow us to review that district court's factual findings.")

The *Colston* decision was on denial of a petition for rehearing *en banc* by an equally divided court. In dissenting on the denial, Circuit Judge De Moss, who dissented also on the panel decision, pertinently commented, "Our appellate jurisdiction to review 'final decisions,' 28 U.S.C. § 1291, does not encompass collateral orders to the extent that they implicate the substantive merits of the complaint." 146 F.3d at 286. Judge De Moss objected that in deciding to accept jurisdiction on the denial of qualified

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[1] *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949), and *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

immunity the panel had agreed to review the core substantive issue in a case being reviewed as a collateral order. 146 F.3d at 292.

In *Johnson v. Jones*, 515 U.S. 304, 313 (1995), this court clearly and plainly addressed the specific issue: A determination of which facts a party may, or may not, be able to prove at trial, is not within the interlocutory appellate jurisdiction of a claim of qualified immunity. Quoting from *Mitchell v. Forsyth, supra*, 472 U.S. at 527, this court reiterated that a claim of qualified immunity is conceptually distinct from the merits, and that although the merits of a claim might sometimes be intertwined with a claim of qualified immunity, the questions underlying the plaintiff's claim on the merits are significantly different.

The Fifth Circuit recently has properly defined the procedure to determine the qualified immunity defense in a First Amendment case. The court first determines whether a violation of a clearly established right has been *alleged*, then determines whether the public officials' conduct was objectively reasonable in light of the law clearly established at the time of the alleged violation. *Kennedy v. Tangipahoa Parish Library Board of Control*, 224 F.3d 359, 377 (5th Cir. 2000), *pet. for rehearing pending*.

The standards for determining a motion for summary judgment have been well established by this court. All inferences which can be reasonably drawn from the summary judgment evidence must be made in favor of the non-movant. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In the Fifth Circuit, rather than relaxing those standards in cases involving unlawful

motivation, the appeals court has made clear that determinations of intent and motive seldom are appropriate for summary resolution. *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d 633, 641 (5th Cir. 1985); *Honoré v. Douglas*, 833 F.2d 565, 569-70 (5th Cir. 1987). The decision in this case clearly is contrary to the Fifth Circuit's own decisional authority.

In this case it was particularly inappropriate for the court to make a summary judgment determination on the merits since the merits were not at issue and petitioner's argument was not to the merits, but to the impropriety of considering the merits on review of a collateral order.

II.

THE QUESTIONS PRESENTED ARE IMPORTANT.

Despite this court's addressing the qualified immunity defense numerous times, it is plainly evident that there remains confusion on the proper scope of review of denial of the defense.

As noted *supra*, the denial of *en banc* consideration in *Colston* was by an equally divided Fifth Circuit Court. A petition for rehearing is pending in *Kennedy*. Dissenting in *Crawford-El*, Chief Justice Rehnquist, joined by Justice O'Connor, suggested a more rigid standard of review of qualified immunity when a motive-based tort is involved, 523 U.S. at 602. A similar test was proposed by Justice Scalia, joined by Justice Thomas. 523 U.S. at 612.

Dissenting in *Colston*, Circuit Judge Benavides, joined by three other circuit judges, commented on "the important question of the proper scope of a court of appeals'

review of the summary judgment record," albeit in the context of a trial court's failure to identify the genuine issue of material fact precluding summary judgment, 146 F.3d at 297. In turn, Circuit Judge De Moss referred to confusion in the court's handling of the qualified immunity review, 146 F.3d at 291, and stated he presented his views "in the hope that they may help to attract the Supreme Court's attention to the increasingly complex panorama of doctrine and dissent that has evolved as the courts of appeals have struggled to reconcile the holdings of *Johnson* and *Behrens*," 146 F.3d at 286.

Judges, and attorneys, as officers of the court, are sworn to defend and protect the Constitution of the United States. There is obvious tension between the ability of individual citizens to assert their constitutional rights and the court's concern for the potential interference of litigation with public officials' discharge of their duties. There need not be, and should not be, any confusion in the judicial determination of the scope of qualified immunity. Counsel must be able to provide individuals with clear statement of the extent of individual rights under the Constitution. Trial and appellate courts must be able to precisely and expeditiously accomplish the necessary balancing considerations.

III.

THE DECISION OF THE COURT OF APPEALS SERIOUSLY INFRINGES ON INDIVIDUAL RIGHTS AND IS A DISINCENTIVE TO THE SAFEGUARDING OF THE PUBLIC INTEREST BY PUBLIC EMPLOYEES.

In *Crawford-El*, this court balanced the competing interests inherent in the qualified immunity defense, and stated:

> This last rationale of fairness does not provide any justification for the imposition of special burdens on plaintiffs who allege misconduct that was plainly unlawful when it occurred. While there is obvious unfairness in imposing liability – indeed, even in compelling the defendant to bear the burdens of discovery and trial – for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that she knew, or should have known, violated the constitutional rights of the plaintiff. *Harlow* itself said as much: "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."

523 U.S. at 589.

This court then proceeded to commend the prompt resolution of the qualified immunity issue and to outline the various ways in which a court can weed out insubstantial claims.

The reference in *Crawford-El* to the use of summary judgment to protect public officials, even when qualified

immunity is not available, however, apparently is subject to misapprehension.

In this case, the appeals court accepted the selective references of the respondents to *Crawford-El* in assuming precisely the opposite of what this court was teaching in that case. Thus, the references to intent as a part of a constitutional violation, 523 U.S. at 592, and to the ability of an employer to prevail on the test in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), *Id.*, were interpreted not only to permit, but to encourage, determination of the merits of the claim on qualified immunity review.

The procedure used by the Fifth Circuit in this case poses serious dangers to the individuals seeking to vindicate their constitutional rights. If qualified immunity is raised before there has been significant discovery, and denied by the district court, the individual would have to defend on appeal the merits of the claim. If, as in this case, the qualified immunity defense is asserted after discovery, when trial is imminent, the result is an improper review of the district court's factual findings and a clear usurpation of the jury's prerogative. The procedure effectively deprives individuals of their constitutional right to a jury's determination of the factual issues.

The concern over potential interruption of a public official's operation must be balanced with the reality of availability to public officials of competent and extensive legal services. State officials are represented by state attorney general's offices which in many cases are as large or larger than the largest law firms in the state.

If a public employee is concerned with how the agency which employs her is discharging its obligations to the public, that employee should be free to properly complain and assert the public interest without fear of having to gather information to fight allegations of incompetence or unsuitability which easily can be made by the agency.

Certainly unsupported assertions of constitutional rights should not be permitted to hinder public service. If there is going to be error in the resolution of claims involving the basic rights of citizens, however, then clearly the law should err on the side of supporting the Constitution, not the convenience and tranquility of a public official.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No 99-20005

SUSAN L. GERHART,

Plaintiff-Appellee

VERSUS

EDWARD J. HAYES, GLENN GOERKE,
JAMES T. HALE,
and
WILLIAM A. STAPLES,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(Filed June 29, 2000)

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM and SMITH, Circuit Judges, and FALLON, District Judge.*

JERRY E. SMITH, Circuit Judge:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

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* District Judge of the Eastern District of Louisiana, sitting by designation.

Rehearing is DENIED. In response to the petition, however, the court determines that it need not have decided whether the plaintiff's statements regarding the allocation of funding were of public concern or whether they were constitutionally protected speech. Instead, it was dispositive of plaintiff's First Amendment retaliation claims that she could not establish that her speech was a "substantial factor" motivating defendants' termination decision and that the defendants had shown that they would have taken the same action even in the absence of her speech. Accordingly, part IV of the opinion, 201 F.3d 646, 650 (5th Cir. 2000), is hereby deleted, and the following is substituted:

IV.

The defendants appeal the denial of their motion for summary judgment on Gerhart's First Amendment retaliation claim. First, they contend that she has not set forth sufficient facts to establish that her statements criticizing the allocation of RICIS's funds were constitutionally protected speech. Next, they argue that even if her speech was protected, she cannot show that her statements were a substantial or motivating factor in their decision to terminate her. Finally, defendants argue that even if her protected speech was a substantial factor in the decision to terminate her, they have established undeniably that they would have terminated her regardless of that speech.

In *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the Court set forth a three-prong test that a plaintiff must satisfy to prevail on a First Amendment retaliation claim. That test provides that: (1) a plaintiff must first show that his speech was on a matter of public concern; (2) he must prove that his speech was a "substantial or motivating factor in the termination;" and (3) the defendant can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. *Id.* at 287.

In our original opinion, we concluded that Gerhart had failed to satisfy the first of these prongs, because when she criticized the amount of discretionary funding the university retained, she "was speaking in her role as an employee, and, consequently, her expression was not a matter of public concern and was not constitutionally protected." 201 F.3d at 650. But because Gerhart's claim fails under the second and third prongs, we can avoid the more difficult question of whether her speech regarding the RICIS funding was on a matter of public concern. *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996); *Moore v. City of Kilgore, Tex.*, 877 F.2d 364 (5th Cir. 1989).

With respect to the causation prong, then, defendants note that only defendant Hayes made the decision to terminate Gerhart. The undisputed summary judgment evidence is that Hale was not involved with personnel matters involving RICIS and made no recommendation or decision regarding Gerhart's employment.

While Goerke, the former president, approved Gerhart's recommended termination before leaving office in

August 1994, it is undisputed that his approval was never acted upon. In fact, Goerke subsequently gave Hayes permission to evaluate Gerhart's performance independently.

Staples had no role whatsoever in the termination decision. Instead, his only involvement was as the final authority in the university's appeal process. Thus, in no way has Gerhart established that these defendants were motivated by her statements to terminate her, because she cannot show that they took any actions as [sic] result of her speech.

Hayes, then, was the only defendant who made the decision to terminate Gerhart. He also was aware of her stated position that the accumulated funds should be used for research purposes, not discretionary spending, a position with which he disagreed. From these two facts, Gerhart asserts that there was sufficient evidence of causation to require that this issue be submitted to the jury.

But these facts are insufficient to defeat summary judgment. Gerhart has offered no other evidence that would establish that the motive behind Hayes's decision to terminate her was to retaliate for her having spoken out on this issue. In *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998), the Court held that where a defendant public official moves for summary judgment, "the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive." Gerhart has failed to set forth any evidence of

improper intent with respect to Hayes or any other defendant.

Gerhart's First Amendment retaliation claims also fail under the third prong of the *Mt. Healthy* analysis. "[E]ven if we assume the exercise of protected first amendment activity played a substantial part in the decision to terminate an employee, the termination is not unconstitutional if the employee would have been terminated anyway." *White v. South Park Indep. Sch. Dist.*, 693 F.2d 1163, 1169 (5th Cir. 1982).

Defendants' summary judgment evidence establishes that they would have fired Gerhart regardless of her stated positions on the RICIS funding. Gerhart – who was hired to diversify and increase the sources of RICIS funding – does not dispute that she failed to secure *any* new funding during her two years on the job. Nor does she dispute that the overall funding for RICIS declined precipitously during her tenure. Notably, even she conceded that it was appropriate for Hayes to link his assessment of her job performance to her success in diversifying and increasing the funding sources for RICIS.

Hayes's May 1995 notification letter recounted these very reasons for her termination. There is no evidence that defendants would not have fired her because of these failures, and all of their evidence suggests they would have done so. Therefore, defendants have established that, even if Gerhart's speech was protected and was a substantial factor motivating their termination decision, they would have taken the same action in the absence of that speech. *See Hillis v. Stephen F. Austin State Univ.*, 665

F.2d 547, 551-52 (5th Cir. 1982) (rejecting as clearly erroneous the factual finding that the plaintiff's non-renewal was predicated on his First Amendment speech, and granting summary judgment).

The order denying summary judgment is REVERSED, and a judgment of dismissal is RENDERED in favor of defendants.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20005

SUSAN L GERHART, PhD

Plaintiff - Appellee

v.

EDWARD J HAYES; ET AL

Defendants

EDWARD J HAYES; GLENN GOERKE;
JAMES T HALE; WILLIAM A STAPLES

Defendants - Appellants

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Jul. 26, 2000)

Before HIGGINBOTHAM and SMITH, Circuit Judges, and FALLON, District Judge.*

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* District Judge of the Eastern District of Louisiana, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No 99-20005

SUSAN L. GERHART,

Plaintiff-Appellee

VERSUS

EDWARD J. HAYES, GLENN GOERKE,
JAMES T. HALE,
and
WILLIAM A. STAPLES,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Feb. 4, 2000)

Before HIGGINBOTHAM and SMITH, Circuit Judges, and FALLON, District Judge.*

JERRY E. SMITH, Circuit Judge:

Susan Gerhart sued Edward Hayes, Glenn Goerke, James Hale, and William Staples following her termination from the University of Houston's Research Institute for Computing and Information Systems ("RICIS"). The

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* District Judge of the Eastern District of Louisiana, sitting by designation.

defendants appeal the denial of their motion for summary judgment on the basis of qualified immunity. Concluding that Gerhart did not allege sufficient facts to create a genuine issue of material fact as to her claim of retaliatory discharge in violation of the First Amendment or of violation of procedural due process, we reverse and render judgment in favor of defendants.

I.

RICIS was founded in 1986 through a cooperative agreement between the University of Houston and the Lyndon B. Johnson Space Center jointly to manage an integrated program of research in advanced data processing technology for the space program. Through the agreement, a portion of the research support funding provided to RICIS by the Space Center was retained by the university's Finance and Administration Department to cover indirect costs associated with the support of RICIS.

In April 1993, Gerhart was hired as the director of RICIS to diversify and increase the sources of RICIS funding. Hale was vice-president for administration and finance, and Hayes was senior vice-president and provost. Gerhart questioned, as excessive, the amount of discretionary funding the university retained. Specifically, she complained to Hale and Hayes that the finance and administration funds should be reallocated for use in RICIS's research program. She also voiced these concerns to other academic colleagues within the university. Her complaints ultimately had little impact, however; none of the defendants adopted her position or changed the allocation of funds.

In May 1995, Hayes notified Gerhart that her employment was being terminated, citing a lack of progress to broaden the funding base for RICIS. In the dismissal letter, Hayes invited her to present any argument or evidence as to why she should be retained. Gerhart did not dispute that the funding for RICIS had declined precipitously during her tenure; she admitted that she had failed to secure *any* new funding for RICIS in the two years she was the director, and she subsequently admitted that it was appropriate for Hayes to link his assessment of her job performance to her success in diversifying the funding sources for RICIS.

Gerhart appealed her dismissal administratively within the university, which assembled a grievance hearing panel of one faculty member and two administrators, all of whom were chosen by a human resources director without any influence by defendants. After hearing testimony and receiving documents from Gerhart, the panel upheld the termination. President Staples received and accepted the panel's recommendation.

Gerhart alleged, *inter alia*, claims pursuant to 42 U.S.C. § 1983, asserting that defendants had violated her First Amendment right to free speech by terminating her in retaliation for her complaints about RICIS's allocation of funding and had violated her procedural due process rights guaranteed by the Fifth and Fourteenth Amendments. The defendants moved for summary judgment on the basis of qualified immunity.[1] The district court denied

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[1] Gerhart argues, for the first time on appeal, that the defendants' assertion of qualified immunity within one month

the motion, concluding that material issues of fact remained as to both claims.

II.

Gerhart argues that we are without jurisdiction to hear this appeal because the defendants seek a review of factual, not legal, issues. She points to *Colston v. Barnhart*, 146 F.3d 282 (5th Cir.) (on petition for rehearing en banc), *cert. denied*, 525 U.S. 1054 (1998), as supporting the proposition that a defendant may not appeal an order denying a qualified immunity defense when review is sought on a finding that the summary judgment record sets forth a genuine issue for trial.[2]

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of the date of trial is abusive and, as a result, that we should summarily dismiss the appeal. She points to the fact that at the time the summary judgment motion was filed, the scheduling order in effect had closed discovery and had closed the filing for dispositive motions.

The defendants correctly point out, however, that their motion was timely filed on the deadline for dispositive motions. Because Gerhart does not set forth any facts that would suggest that the defendants acted with any dilatory or improper motive in filing when they did, we decline the request to dismiss.

[2] Gerhart also quotes *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 633 (5th Cir. 1999), in which we stated, in a qualified immunity case, that "[w]e have appellate jurisdiction to review the district court's decision denying summary judgment only to the extent it turns on an issue of law. Or said differently, our appellate jurisdiction does not allow us to review that district court's factual findings." Gerhart does not read enough of *Lemoine*, however, for that court actually held that, consistent with *Colston*, we defer only to a district court's articulation of the genuinely disputed facts, *not* to a determination that those facts are material. *See id.* at 634.

Gerhart selectively quotes from Colston and overlooks its more important and relevant discussion. In interpreting *Behrens v. Pelletier*, 516 U.S. 299 (1996), the *Colston* court noted that "when a district court denies a motion for summary judgment on the ground that 'genuine issues of material fact remain,' the court has made two distinct legal conclusions. First, the court has concluded that the issues of fact in question are *genuine*." *Colston*, 146 F.3d at 284 (emphasis added).

More significantly, the *Colston* court noted the district court's second legal conclusion "that the issues of fact are *material*, i.e., resolution of the issues might affect the outcome of the suit under governing law." *Id.* (emphasis added). While the first of these determinations was not reviewable, *Colston* and *Behrens* made "clear that an appellate court is free to review a district court's determination that the issues of fact in question are material." *Id.*

When a district court does not identify the evidence that creates the "genuine" issue of fact, we "may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Behrens*, 516 U.S. at 313. Here, on both claims the district court stated only summarily that there remained genuine issues of material fact that precluded summary judgment. Consequently, we may review the underlying facts to make our own determination on *both* genuineness and materiality issues.

Moreover, we have jurisdiction to consider whether the district court applied the correct legal standard on

summary judgment.[3] Here, that review involves a question of what are the necessary elements of each of Gerhart's claims and whether there are genuine issues of material fact on *each* of those elements. These are questions of law that we review *de novo*. Before reaching the narrower issue of qualified immunity, we must consider whether the plaintiff has alleged the violation of a clearly established constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

III.

Defendants argue that the district court incorrectly rejected their qualified immunity defense on Gerhart's procedural due process claim. They assert that she has not set forth sufficient facts to establish a constitutional claim of a due process violation. Gerhart, on the other hand, alleges that the defendants violated her right to procedural due process because she was not provided sufficient notice of the reason for her termination and was not afforded the opportunity to have an attorney present at the administrative review panel.

The district court concluded that there was a material issue of fact as to whether the defendants had provided adequate notice of termination and an opportunity for Gerhart to be heard. The court did not identify what

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[3] *See Hare v. City of Corinth*, 74 F.3d 633, 638 (5th Cir. 1996) (en banc) (holding that the appeal did not present a fact-intensive inquiry, but "[r]ather, it presents a legal issue antecedent to the determination of whether there are genuine issues of material fact. Our review of the legal issues in this appeal goes to the legal question of the correct legal standard.").

those issues of fact were, however, but instead focused almost exclusively on justifying its conclusion that Gerhart held a constitutionally protected property interest in continued employment.

Regardless of the nature of Gerhart's interest in her employment,[4] it was incumbent on the court to identify which facts were at issue and were material to her claim of a due process violation. Because it failed to do so, we must undertake an independent review of the record to determine which facts, if any, were genuinely disputed and were material to the claim.

The constitutional guarantee of due process requires notice and an opportunity to respond. *See generally Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In our review of the record, we find no facts that suggest that Gerhart did not receive both. First, it is undisputed that she received the termination letter from Hayes. It provided her with the reason for her termination, – i.e., her complete failure to achieve the main job objective of increasing funding for RICIS – and it informed her of the procedure for appealing the decision to Hayes.

Furthermore, when she received the notice of intent to terminate her employment, Gerhart provided extensive documentation in an attempt to rebut any criticism of her performance. Hayes read her response. It is odd, then, that Gerhart still maintains that although she received the letter, on its face that letter gave no notice of any charges

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[4] For purposes of this appeal, the defendants have conceded that Gerhart has a constitutionally protected liberty interest in continued employment.

against her that would support her termination. The undisputed facts simply do not support her assertion, and, as a result, no issues of fact remain as to whether she received notice.

In addition, Gerhart argues that she did not have an opportunity to be heard, because she was not allowed an attorney at her administrative hearing.[5] She asserts that under Texas law, a public employee is entitled to be represented by an attorney where termination of employment is at issue. What she fails to establish, however, is that constitutional due process requires an attorney present at her post-termination administrative review hearing. The fundamental issue in due process law is not whether state officials violated state law, but whether they provided the plaintiff with the constitutional minima.[6]

Gerhart has not set forth any facts establishing that the defendants violated the constitutional due process minima of notice and an opportunity to be heard. *See Loudermill.* Therefore, the district court erred in denying summary judgment on this claim.

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[5] On appeal, Gerhart does not renew her argument that the administrative review panel's members were biased.

[6] *See FM Properties v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) ("Converting alleged violations of state law into federal due process claims improperly bootstraps state law into the Constitution.") (internal punctuation marks omitted) (*quoting Stern v. Tarrant County Hosp. Dist.*, 778 F.2d 1052, 1056 (5th Cir. 1985) (en banc)).

IV.

The defendants appeal the denial of their summary judgment motion on Gerhart's First Amendment claim. They contend that she has not set forth sufficient facts to establish the required elements for determining whether a public employee has been discharged in retaliation for constitutionally protected speech, *to-wit*, that (1) the employee's speech must be "a matter of public concern;" (2) "the public employee's interest in commenting on matters of public concern must outweigh the public employer's interest in promoting efficiency;" and (3) "the employee's speech must have motivated the decision to discharge the employee." *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995).

The district court concluded that there was "a fact question concerning whether Gerhart's expression of concern regarding allocation of RICIS funds constitutes protected speech and if so, whether her utterance of this speech was the real reason she was terminated." But the court is mistaken. The question whether Gerhart's expression is constitutionally protected speech is a *legal* issue, not a factual one, and there is no dispute as to the content of that speech. Consequently, whether Gerhart's speech is a matter of public concern is a question that is appropriate for summary judgment.

In *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996), we held that "speech made in the role as employee is of public concern only in *limited* cases: those involving the report of corruption or wrongdoing to higher authorities." (Emphasis added.) Gerhart relies on *Barnes v. McDowell*, 848 F.2d 725, 734 (6th Cir. 1988), for

the proposition that "it is possible to view allegations that public monies are being spent unwisely and that government program is being run inefficiently, as implying that public agency or official is corrupt."

But even *Barnes* does not support Gerhart's position, for that court opined that "when a defendant has moved for summary judgment, a plaintiff must present concrete evidence to support the allegation [of retaliation] in order to survive the motion." *Id.* Gerhart has not done this: She sets forth no facts or allegations that she spoke out as a citizen, rather than as an employee. Likewise, she has presented no evidence or allegations that her speech involved the reporting of any corruption or wrongdoing by the defendants.

The only logical inference from the facts presented is that Gerhart was speaking in her role as an employee, and, consequently, her expression was not a matter of public concern and was not constitutionally protected speech. Thus, the district court should have granted summary judgment.[7]]

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[7] *See Wallace*, 80 F.3d at 1051 (upholding summary judgment because plaintiff "failed to allege facts, much less present evidence, sufficient to constitute speech on a matter of public concern"). *Accord Barnes*, 848 F.2d at 736 (noting that plaintiff "presented no evidence linking any of [the employee's expression] to corruption in the Bureau or in the Program. Consequently, instead of having addressed a matter of public concern, [plaintiff's] complaints appear to be nothing more than examples of the quintessential employee beef: management has acted incompetently.").

The order denying summary judgment is REVERSED, and a judgment of dismissal is RENDERED in favor of defendants.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

SUSAN L. GERHART, Plaintiff,	§	CIVIL ACTION NO. H-97-1834
v.	§	
EDWARD J. HAYES, GLENN GOERKE, JAMES T. HALE, EDWARD HUGETZ, WILLIAM A. STAPLES, AND THE UNIVERSITY OF HOUSTON-CLEAR LAKE, Defendants.	§	

ORDER

(Filed Dec. 10, 1998)

Pending before the Court is the Motion for Summary Judgment (Document # 36) filed by the Defendants Glenn Goerke, James T. Hale, Edward Hugetz, Edward J. Hayes, William A. Staples, and the University of Houston – Clear Lake (hereinafter collectively referred to as "the defendants") and the Motion to Withdraw Admissions (Document # 45) filed by the defendants. Having considered the motions, submissions, and applicable law, the Court determines that the motion for summary judgment should be granted in part and denied in part and the motion to withdraw admissions should be denied.

Plaintiff Susan L. Gerhart ("Gerhart") filed this lawsuit against the defendants arising from her termination from the University of Houston-Clear Lake. According to the Plaintiff's First Amended Complaint, Gerhart was employed as the director of the University's Research Institute for Computing and Information Systems ("RICIS") beginning on April 19, 1993. RICIS was founded in 1986 through a cooperative agreement between the University and the Lyndon B. Johnson Space Center ("JSC") to jointly define and manage an integrated program of research in advanced data processing technology for the space program. The cooperative agreement provided for a portion of the research support funding provided by JSC to be used to cover accounting related to outside projects. These funds were allocated to the University's finance and administrative department. As RICIS was expanded, a surplus of funds was accumulated. Gerhart contends that she was terminated from her position because she raised concerns regarding the allocation of these surplus funds.

Gerhart alleges the following causes of action in the First Amended Complaint: violation of her First Amendment Right to Free Speech brought via 42 U.S.C. § 1983; violation of her procedural and substantive due process rights guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution brought via § 1983; violation of Title VII, 42 U.S.C. § 2000e, et seq.; violation of the Americans with Disability Act ("ADA"), 42 U.S.C. § 12101, et seq.; state law claims of intentional infliction of emotional distress and tortious interference with contract.

The defendants collectively have filed a motion for summary judgment seeking to dismiss all of Gerhart's claims. According to the motion, summary judgment is appropriate because the plaintiff cannot establish the existence of a genuine issue of material fact on each of her allegations.

Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Initially the movant bears the burden of demonstrating to the Court that there is an absence of a genuine issue of any material fact. *Id.* at 323. The burden then shifts to the party who bears the burden of proof on the claims on which summary judgment is sought, to present evidence beyond the pleadings to show there is a genuine issue for trial. *Id.* A genuine issue far trial exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

Defendants first assert that certain of Gerhart's claims are barred by the Eleventh Amendment to the United States Constitution. The defendants state that plaintiff's claims brought under § 1983 and the state law claims are barred by the Eleventh Amendment against those defendants sued in their official capacities: Hayes, Staples, and the University. The Eleventh Amendment shields a state from suit in federal court unless the state consents to the suit or waives its immunity. *Edelman v.*

Jordan, 415 U.S. 651, 673 (1974). A damages action against a state official in his or her official capacity is tantamount to a suit against the state itself and, absent waiver or consent, would be barred by the Eleventh Amendment also. *Ex Parte Young*, 209 U.S. 123 (1908). Although Congress may expressly abrogate a state's Eleventh Amendment immunity, Congress did not do so in passing § 1983.

In her response to the defendants' motion for summary judgment, Gerhart has not addressed the Eleventh Amendment issue. Thus, the Court will presume that the plaintiffs' claims brought under § 1983 and state common law claims are not brought against any of the defendants in their official capacities or against the University. To the extent that the plaintiff did allege such claims against these defendants, those claims are dismissed.

Defendants next argue that Gerhart's claims against the individual defendants are barred by the doctrine of qualified immunity. Qualified immunity, an affirmative defense, shields public officials exercising discretionary functions from liability unless a plaintiff can establish that the constitutional rights the defendants are accused of violating were clearly established at the time of the alleged offenses. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). When applying the objective qualified immunity standard to § 1983 claims, courts are to resolve two issues: (1) whether the plaintiff has stated a violation of a constitutional or federal statutory right; and (2) whether that right was sufficiently clear that a reasonable official would understand that what he or she was doing violated that right.

According to the plaintiff the alleged violations of her constitutional rights, were clearly established at the time she was terminated. Thus, whether the defendants acted in bad faith or not is not relevant to the qualified immunity determination. The Court agrees with the plaintiff. Gerhart's constitutional claims against the defendants in their individual capacities are not appropriate for summary dismissal based on the affirmative defense of qualified immunity.

Having discussed both the Eleventh Amendment and qualified immunity issues, the Court next examines the merits of each of the plaintiff's claims to determine whether summary judgment should be granted.

1. Procedural Due Process

Gerhart alleges that Staples and Hayes violated her right to procedural due process guaranteed by the Fourteenth Amendment. The Due Process Clause requires that public employees receive notice and an opportunity to be heard before being deprived of a protected interest. *Williams v. Texas Tech Univ. Health Sciences Center.*, 6 F.3d 290, 293 (1993). According to the defendants, Gerhart cannot establish that she has a property interest in her position as a director. In order to prevail on a procedural due process claim in the public employment context, a plaintiff must initially show that he or she had a constitutionally protected property interest in his/her continued employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

A court encountering a procedural due process claim must first determine whether the plaintiff has been

deprived of a life, liberty, or property interest that is constitutionally protected as a matter of substantive law. The defendants contend that as Gerhart was specifically hired as an at-will employee, there could be no expectation of continued employment and therefore no property interest in her employment. In support, they attach a letter dated April 15, 1993 offering Gerhart the position as director. Nothing in the letter indicates that the offer of employment is for a certain period of time. Further, nothing in the University's employment manual deviates from the presumption under Texas law that all employments are at-will unless otherwise agreed upon by the employer and the employee.

In response to the defendants' motion for summary judgment, Gerhart refers to the University's responses to plaintiff's request for admissions which state that public employees are entitled to due process "for regular, benefits-eligible employee past probation." *See* Admission No. 28. Further, the University's admissions imply that Gerhart could not have been terminated legally without cause or a hearing. *See* Admission No. 29. The University has filed a motion seeking to withdraw these admissions arguing that they were erroneously admitted and are inconsistent with the responses of the other defendants. *See* Document # 45. The defendants further argue that as the procedural due process claim only is asserted against Staples and Hayes that it would be unfair to use the University's admissions against these defendants.

The Court determines that the admissions made by the University may not be withdrawn. Further, as the admissions in question concern the University's policy regarding termination, it is proper for these admissions to

be used in consideration of the procedural due process claim in the summary judgment context. The University's admissions establish that a genuine issue of material fact exists concerning Gerhart's property interest in her continued employment. As such, fact questions remain regarding whether Hayes provided adequate notice of termination and an opportunity for Gerhart to be heard to satisfy procedural due process considerations.

Notwithstanding these admissions, the Court determines that the procedural due process claim should be dismissed with respect to Staples. According to Gerhart's own deposition, Staples played no role in the events leading up to her termination. His only participation was in accepting the post-termination grievance panel's recommendation. Thus, the procedural due process claims are properly dismissed against Staples.

2. Substantive Due Process

Gerhart has alleged a substantive due process violation against Hayes. In order to succeed with a claim based on substantive due process in the public employment context, a plaintiff must show that she had a property interest in her employment and the employer's termination of that interest was arbitrary and capricious and not reasonably related to a legitimate government interest. *Williams*, 6 F.3d at 294. The defendants argue that Gerhart cannot establish the existence of a genuine issue of material fact on each of the elements of a substantive due process claim. In response, Gerhart argues that her

termination because of her exercise of her First Amendment rights, implicates substantive due process protection. She also argues that a university's evaluation of an employee's performance can be found to be arbitrary and capricious in certain instances. For support, she refers to the deposition testimony of her expert witness Regina Smith. The gist of Smith's testimony is that it was unreasonable to expect Gerhart to increase funding to RICIS in only two years given the complex and timely process of completing grant proposals and awaiting responses for grant requests.

The Court determines that the substantive due process claim should be dismissed. Smith's testimony does not establish a fact question concerning whether Gerhart's termination was arbitrary or capricious. It merely establishes that Smith believes that Gerhart should have been given more time in which to secure outside funding for RICIS. Smith's evaluation is not sufficient to create a fact question on whether the decision to terminate Gerhart was arbitrary, capricious, and not reasonably related to a legitimate governmental interest.

3. First Amendment Retaliation Claim

Gerhart's First Amended Complaint alleges that the real reason she was terminated as director of RICIS was her questioning the University's retention of indirect costs embedded in the cooperative agreement with NASA. To state a claim for violation of free speech a plaintiff must establish: (1) speech addresses a matter of public concern; (2) the employee's interest in communicating upon matters of public concern outweighs the

defendant's interest in promoting the efficiency of the public service she performs; and (3) the employee suffered an adverse employment action motivated by the uttered speech. *Thompson v. City of Starkville*, 901 F.2d 456, 460 (5th Cir. 1990). Defendants first argue that Gerhart's discussions of the allocation of the imbedded costs of RICIS were made in her role as an employee rather than as a citizen. Speech made in the role of an employee cannot be a matter of public concern. *Ayoub v. Texas A&M Univ.*, 927 F.2d 834, 837 (5th Cir. 1991). The Court determines that a fact question exists regarding whether Gerhart's words were uttered in her role as an employee or as a citizen.

With respect to whether the content of Gerhart's speech was protected, the defendants do not dispute Gerhart's allegation that she expressed concern about the allocation of the imbedded costs. Thus, the Court determines that the record establishes a fact question concerning whether Gerhart's expression of concern regarding allocation of RICIS funds constitutes protected speech and if so, whether her utterance of this speech was the real reason she was terminated, Accordingly, summary judgment should be denied with respect to the First Amendment retaliation claim.

However, the Court determines that the First Amendment retaliation claim should be dismissed against Hugetz as it is barred by the applicable two-year statute of limitations. Hugetz left his position as provost in July or August, 1994. Gerhart's claims against Hugetz occurred while he was provost. Thus, the limitations period on Gerhart's claims against Hugetz would have run by August 31, 1996, Gerhart did not file this case

until May 23, 1997. Further, Gerhart, in her response to motion for summary judgment, did not respond to Hugetz's argument that the First Amendment Retaliation claim against him should be dismissed as it barred. Accordingly, Gerhart's First Amendment retaliation claim against Hugetz is properly dismissed.

4. Disability Claims

Gerhart alleges a claim pursuant to the Americans with Disabilities Act, She states that she has a medical problem with her vision. To prevail on her ADA claim Gerhart must establish: (1) that she has a disability; (2) she was qualified for the job; and (3) an adverse employment action was taken solely based on her disability. *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996). In their motion for summary judgment, the defendants argue that there is no evidence to support Gerhart's claim. In the response to the motion, Gerhart completely fails to respond to or provide any summary judgment evidence to support her ADA claim. Thus, the Court determines that Gerhart has failed to meet her summary judgment burden of establishing that a fact question on this claim exists and it is properly dismissed.

5. Title VII: Gender Discrimination

Defendants also seek dismissal of Gerhart's gender discrimination claim. Gerhart has alleged that her gender was a motivating reason for her termination and that she was replaced by a male. To bring a claim under Title VII

for gender discrimination a plaintiff must establish: she belongs to a qualified class, she was qualified to do her job; despite her qualifications, her employment situation was adversely affected; and she was replaced by a member of the opposite sex or members of the opposite sex were treated differently in the terms and conditions of their employment. 42 U.S.C. § 2000e-2(a), Defendants concede that Gerhart is a member of a protected class, that she was qualified for her position and suffered adverse employment action. However, the defendants argue that Gerhart cannot maintain a Title VII claim because a male did not replace her. The defendants state that no full time director of RICIS has been hired to replace Gerhart and thus, she cannot make out a prima facie case for discrimination. Further, the defendants argue that Gerhart cannot establish that the defendants intentionally discriminated against her.

In response, Gerhart argues that the interim director hired to replace Gerhart is a male. Thus, even thought [sic] the interim director is a member of the faculty and was not actually hired to permanently replace Gerhart, for purposes of the summary judgment determination the Court will presume that Gerhart has met her prima facie case under Title VII. According to *McDonnell Douglas v. Green*, 411 U. S. 792 (1973), once a plaintiff has made out a prima facie case of discrimination, the presumption of unlawful conduct by the defendants arises and the burden shifts to the defendants to articulate a non-discriminatory reason for the termination. The plaintiff must then establish that the stated reason for the decision is merely a pretext.

In this case, the defendants state that the reason Gerhart was terminated was for failing to obtain additional funding for RICIS. This is a legitimate, non-discriminatory reason for the adverse employment decision. However, in response Gerhart has not produced any summary judgment evidence indicating that her termination was really based on her gender. Accordingly, the Court determines that the Title VII gender discrimination claim must be dismissed.

6. Intentional Infliction of Emotional Distress

Defendants argue that Gerhart cannot establish a fact issue regarding her intentional infliction of emotional distress claim ("IIED") and that this claim should be dismissed. Pursuant to Texas law, a plaintiff asserting a claim of IIED must establish: (1) the defendants acted intentionally or recklessly; (2) the defendants' conduct was extreme and outrageous; (3) the defendants' actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989). Extreme and outrageous conduct is defined as conduct that "surpasses all bounds of decency, such that it is utterly intolerable in a civilized community. . . . Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." *Ward v. Bechtel Corp.*, 102 F.3d 199, 203 n.2 (5th Cir. 1997).

Gerhart responds that the defendants' destroyed Gerhart's established career by the blatant abuse of their power, causing her to suffer severe emotional distress cause. Beyond this self-serving statement, Gerhart has

provided no summary judgment evidence to support this claim. As such, the IIED claim should be dismissed.

7. Tortious Interference with Gerhart's Employment

The basis of Gerhart's tortious interference claim is that she had a reasonable expectation of continuing employment, in which the defendants wrongfully interfered. The elements of a tortious interference claim are: (1) a contract; (2) willful interference; (3) proximate cause; and (4) damages. *Juliette Fowler Homes Inc. v. Welch Assocs.*, 793 S.W. 2d 660, 664 (Tex. 1990). The defendants argue that Gerhart cannot establish a fact question of each element of this claim because the defendants' actions, within the scope of their employment, cannot be the basis for liability for interference with Gerhart's business relations.

The Court agrees with the defendants. The defendants' actions in terminating Gerhart as an employee cannot, as a matter of law, form the basis of a claim for tortious interference of contract. Therefore, this claim is properly dismissed at the summary judgment stage.

Based on the foregoing, the Court hereby

ORDERS that the Motion for Summary judgment (Document #36) is GRANTED in part and DENIED in part. Gerhart's substantive due process claim, intentional infliction of emotional distress claim, Title VII gender discrimination claim, ADA claim, intentional infliction of emotional distress claim, and tortious interference with contract claim are hereby DISMISSED. Summary judgment is DENIED with respect to Gerhart's procedural due

process claim against Hayes but GRANTED with respect to her procedural due process claim against Staples. Further, summary judgment is DENIED with respect to Gerhart's First Amendment retaliation claim, except as against Hugetz for whom the summary judgment is GRANTED on the First Amendment cause of action.

The Motion to Withdraw Admissions (Document # 45) is DENIED.

SIGNED at Houston, Texas on this the 10 day of December, 1998.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20005

SUSAN L GERHART, PhD

Plaintiff - Appellee

v.

EDWARD J HAYES; ET AL

Defendants

EDWARD J HAYES; GLENN GOERKE;
JAMES T HALE; WILLIAM A STAPLES

Defendants - Appellants

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 02, 2000)

(Opinion 2/4/00, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM and SMITH, Circuit Judges, and FALLON, District Judge.*

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* District Judge of the Eastern District of Louisiana, sitting by designation.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing; the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35, the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge